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NOTES

Apportioning Contribution in Section 10(b) and Rule 10b-5 Multi-Defendant Suits: A Critique of Relative Culpability Shares in the Wake of *Smith v. Mulvaney*

I. INTRODUCTION

Through judicial implication,[1] section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5 promulgated thereunder form the statutory basis supporting a private right of action for fraud in the national securities market. Defendants under section 10(b) and rule 10b-5 fall within the general common law definition of an intentional tortfeasor and must act with scienter as a prerequisite to civil liability.[2]

While at common law the equitable doctrine of contribution has generally been denied jointly and severally liable co-defendants where their harms were intentional,[3] since 1968 federal courts have recognized this right between co-defendants in section 10(b) and rule 10b-5 actions.[4] Traditionally, courts appor-

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1. *See infra* note 2.

2. The Supreme Court held that a successful private action for damages under section 10(b) and rule 10b-5 requires an allegation of scienter. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194-214 (1976).

"The statutory deception requirement has been held to mandate a showing of scienter in order to state a 10b-5 claim because deception connotes common law fraud and common law fraud requires scienter." T. HAZEN, SECURITIES REGULATION § 13.4, at 458 (1985) (footnote omitted). For further discussion of the federal definition of scienter, see *infra* notes 66-77 and accompanying text.

3. *See* UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(c), 12 U.L.A. 63 (1975); RESTATEMENT (SECOND) OF TORTS § 886A(3) (1979); *see also* UNIFORM COMPARATIVE FAULT ACT § 1 comment, 12 U.L.A. 39 (1975 & Supp. 1988) ("The Act does not include intentional torts."); *But see* PROSSER & KEETON ON TORTS § 50, at 339 & n.25 (W. Keeton 5th ed. 1984) (text and footnote refer to a few jurisdictions that have allowed contribution for intentional torts).

4. *See generally* Loewenstein, *Implied Contribution Under the Federal Securities Laws: A Reassessment*, 1982 DUKE L.J. 543.

tioned this right between defendants on a pro-rata or equal percentage basis. However, since the late seventies, federal courts have begun a trend toward employing relative fault apportionment. Recently, the Ninth Circuit in *Smith v. Mulvaney*[5] has become the first federal appellate court to expressly endorse relative fault apportionment between section 10(b) and rule 10b-5 defendants.

This comment traces the major precedents and rationale which have led to the trend accepting relative fault apportionment and suggests reasons why pro-rata apportionment may be more appropriate in section 10(b) and rule 10b-5 suits for contribution. This comment concludes by suggesting that courts evaluate and recognize the merits of pro-rata apportionment before bandwagon acceptance of relative fault apportionment occurs.

II. BACKGROUND

Full disclosure and rejection of the caveat emptor doctrine compose the nucleus of federal securities legislation.[6] A significant part of the Securities Act of 1933[7] and the Securities Exchange Act of 1934[8] was to impose federal remedies, and in some instances provide federal private rights for damages, for fraudulent or quasi-fraudulent activities in the national securities industry.[9] Together the Acts include three general anti-fraud provisions, a number of specialized anti-fraud provisions, and provisions which ensure complete and continued disclosure in connection with public offerings.[10] One of the three general anti-fraud provisions is section 10(b)[11] of the 1934 Exchange Act.

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5. 827 F.2d 558 (9th Cir. 1987).

6. *See* SEC v. Capital Gains Research Bureau, 375 U.S. 180 (1963); *see also* Knauss, *A Reappraisal of the Role of Disclosure*, 62 MICH. L. REV. 607, 607 & nn.1-4 (1964).

7. 15 U.S.C. §§ 77a-77bbbb (1982).

8. 15 U.S.C. §§ 78a-78kk (1982).

9. *See generally* Miller, *Introduction to Rule 10b-5*, in THE 10B SERIES OF RULES 1, 2-3 (H. Enberg ed. 1975).

10. The three general fraud provisions are section 17(a) of the 1933 Act, section 15(c)(1) of the 1934 Act, and section 10(b) of the 1934 Act. For further general discussion of these acts and the specialized anti-fraud provisions, see Miller, *supra* note 9.

11. 15 U.S.C. § 78j(b) (1982). This section provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered,

Section 10(b) fraud reaches only violators acting with scienter.[12] In contrast, under the other general fraud provisions, violations may be premised on intent ranging from scienter to mere negligence.[13]

Although civil actions for damages are not expressly provided for in section 10(b), that right has been *judicially implied* and recognized since 1946 by federal courts including the Supreme Court.[14] This fact, coupled with the broad scope of potential defendants and plaintiffs covered by section 10(b) and rule 10b-5,[15] makes section 10(b) and rule 10b-5 a popular starting point for plaintiffs.

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any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

12. *See supra* note 2.

13. For example, in Supreme Court litigation it has been held that the SEC must only allege negligence to meet section 17(a) of the 1933 Securities Act fraud requirements for administrative enforcement proceedings. The Court noted that section 10(b) liability is based on a more stringent scienter requirement and intended coverage is limited to knowing or intentional misconduct. *See* Aaron v. SEC, 446 U.S. 680, 690-91 (1980).

14. "[A] private right of action under § 10(b) of the 1934 Act and Rule 10b-5 has been consistently recognized for more than 35 years. The existence of this implied remedy is simply beyond peradventure." Herman & MacLean v. Huddleston, 459 U.S. 375, 380 & n.10 (1982) (in footnote 10 the Court refers to the first federal case to find an implied right to contribution, Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946), and outlines the history of that private right since then).

15. Section 10(b) gives the SEC authority to prescribe as necessary or appropriate rules for the protection of investors. Rule 10b-5 is one of those. The following interpretation of the origin of rule 10b-5 is instructive:

> The origin of rule 10b-5 lies in the absence in section 17(a), as interpreted, of any prohibition against fraud in connection with the *purchase* of a security by persons other than over-the-counter brokers or dealers. While section 15(c)(1) covers purchases by over-the-counter brokers or dealers, other persons were not covered; this gap was very important and there were various attempts made to remedy it. The revision program of 1941 contemplated extending section 17(a) of the 1933 Act to cover purchases, but this change was shelved. Then, in May 1942, the Commission adopted rule . . . 10b-5, incorporating (with minor variations) the language of section 17(a) and applying it to the purchase or sale of any security.

Miller, *supra* note 9, at 4 (emphasis in original). Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
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> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
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> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

Section 10(b) and rule 10b-5 actions commonly involve multiple defendants[16] who, under federal securities law, are jointly and severally liable[17] to a plaintiff or plaintiff class for large amounts of actual damages.[18] When one of a group of liable defendants brings a third party action for contribution against an out-of-court or settling co-defendant, courts face the difficult task of apportioning shares of contribution between them.[19]

III. The Rise and Fall of Pro-Rata Apportionment

A. Congressional Intent and Traditional Pro-rata Apportionment

Although the right of contribution is not statutorily mandated under section 10(b) or rule 10b-5, federal courts have con-

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in connection with the purchase or sale of any security.

17 C.F.R § 240.10b-5 (1988).

16. "As securities law litigation has grown, imaginative plaintiffs have included greater numbers of persons and corporations as defendants. With increasing frequency, securities fraud complaints are naming as defendants not only primary wrongdoers, but many whose activities are collateral or secondary to the primary wrong." Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy*, In Pari Delicto, *Indemnification, and Contribution*, 120 U. Pa. L. Rev. 597, 599 (1972).

17. 15 U.S.C. § 77k(f) (1982). This codifies section 11(f) of the 1933 Act and provides for joint and several liability under section 11. Courts have, by way of judicial implication, held this provision applicable to section 10(b). *See, e.g.*, deHaas v. Empire Petroleum Co., 286 F. Supp. 809, 815-16 (D. Colo. 1968), *aff'd in part, vacated in part*, 435 F.2d 1223 (10th Cir. 1970).

18. *See generally* Mullaney, *Theories of Measuring Damages in Securities Fraud Cases and the Effects of Damages on Liability*, 46 Fordham L. Rev. 277 (1977). Though section 28(a) of the Exchange Act of 1934 limits damages to actual damages and exempts the punitive element which usually would be a major damage factor in intentional torts such as fraud, courts have expanded the concept of actual damages in securities fraud actions as a deterrent to federal securities law violation. *See* Butowsky, *Remedies for Violations of Rule 10b-5 in General*, in The 10b Series of Rules 161, 162, 167 (H. Enberg ed. 1975).

19. Usually when a 10b-5 action is pursued in federal court, state law claims are brought in by pendent jurisdiction. The court then must determine rights of contribution and damages from state law claims as well.

Federal courts work within the confines of federal case law to determine the rights and liabilities of the parties involved: "The extent of [the] right of contribution is a matter of federal law." T. Hazen, Securities Regulation § 7.7, at 206 (1985); *see also* Donovan v. Robbins, 752 F.2d 1170, 1179 (7th Cir. 1985); Locafrance U.S. Corp. v. Intermodal Systems Leasing, Inc., 558 F.2d 1113, 1115 (2d Cir. 1977). While some courts have applied state law to determine the rights and liabilities with regard to contribution, these opinions have been criticized, go against the weight of precedent, and should be regarded as anomalies. *See, e.g.*, First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co., 631 F. Supp. 1029, 1034-36 (S.D.N.Y. 1986) (court's adoption of state rules expressly criticized in Nelson v. Bennett, 662 F. Supp. 1324, 1336 (E.D. Cal. 1987).

sistently found an implied right to contribution since 1978.[20] Traditionally, in securities litigation, courts have held that shares of contribution in multi-defendant actions were based on a pro-rata share of the total liability assessed in court.[21] The governing rationale offered by courts and commentators sustaining pro-rata apportionment was that private remedy sections of the securities acts provide a right to contribution "as in cases of contract."[22] Since contribution in cases of contract is apportioned pro-rata,[23] it was inferred that contribution under securities law was intended by the legislature as pro-rata.[24] Courts apportioning contribution this way did not question whether pro-rata or relative fault was the proper measure. For example, in the first case to articulate pro-rata shares for contribution in section 10(b) actions, *Globus, Inc. v. Law Research Services*,[25] the court simply used the pro-rata method without any analysis.[26] Courts following *Globus* similarly have not justified their

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20. The first case to recognize an implied right of contribution was deHaas v. Empire Petroleum Co., 286 F. Supp. 809, 815-16 (D. Colo. 1968), *aff'd in part, vacated in part*, 435 F.2d 1223 (10th Cir. 1970).

Federal courts have recognized this right to contribution on three grounds. First, although section 10(b) and rule 10b-5 contain no provisions concerning contribution, courts have looked to express provisions in the securities acts of 1933 and 1934 that do and have applied them by incorporation into the rule. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 206 (1976) ("The 1933 and 1934 Acts constitute interrelated components of the federal regulatory scheme governing transactions in securities."); *see also* SEC v. National Securities, Inc., 393 U.S. 453, 466 (1969). These provisions are found in section 11(f) of the 1933 Act, 15 U.S.C. § 77k(f) (1982), and sections 9(e), 15 U.S.C. § 78i(e) (1982), and 18(b), 15 U.S.C. § 78r(b) (1982), of the 1934 Act and expressly establish the right of contribution for the person liable to make payment under the Act's provisions. Second, courts have rationalized the right of contribution based on trends in the law moving towards a right to contribution among all joint tortfeasors. Finally, courts buttress their positions by noting consistency with the legislative intent behind the Acts to deter fraud by all tortfeasors (not just the one held liable in court) and general principles of fairness. For a more in depth analysis of these three points, see Loewenstein, *Implied Contribution under Federal Securities Laws: A Reassessment*, 1982 DUKE L.J. 543, 552-59.

21. *See* Globus, Inc. v. Law Research Serv., Inc., 318 F. Supp. 955, 957-58 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

22. *See* 15 U.S.C. § 77k(f) (1982); 15 U.S.C. § 78i(e) (1982); 15 U.S.C. § 78r(b) (1982). These sections correspond respectively to section 11(f) of the 1933 Securities Act and sections 9(e) and 18(b) of the 1934 Exchange Act. The language in each of the statutes grant a right of contribution "as in cases of contract."

23. *See generally* A. CORBIN, CORBIN ON CONTRACTS § 935 (1951).

24. *See* Adamski, *Contribution and Settlement in Multiparty Action Under Rule 10b-5*, 66 IOWA L. REV. 533, 557 (1981).

25. 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

26. *Id.* at 957.

use of the pro-rata measure beyond a strict reading of the "as in cases of contract" language.[27]

Without uprooting pro-rata precedent, some courts found a way to incorporate notions of equity in this framework by using pro-rata principles of collective liability.[28] Instead of holding each of a group of defendants jointly and severally liable, they split up the group into jointly and severally liable entities and each entity was responsible for its respective share.

This principle was first articulated in *Wassel v. Eglowsky*.[29] In *Wassel*, two sellers were held liable for fraud under the federal securities acts.[30] The sellers sought and were granted contribution from an attorney who had been materially involved in the fraud. Under general principles of pro-rata apportionment, the seller's right of contribution from the attorney would have been limited to one-third of the total damages paid by the two sellers. The court, however, granted a contribution right of one-half in favor of the sellers. Although both sellers acted intentionally,[31] the court decided that since one seller's actions were "largely derivative"[32] of the other's, their liability would be lumped together into one entity. This entity would then be jointly and severally liable with the attorney. Therefore, the entity could seek contribution to the amount of one-half of the damages from the attorney found liable in the contribution cross-claim.[33] Though *Wassel* provided for some equitable prin-

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27. *See, e.g.*, Wassel v. Eglowsky, 399 F. Supp 1330, 1370 (D. Md. 1975), *aff'd per curiam*, 542 F.2d 1235 (4th Cir. 1976); Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp. 112, 136 (S.D.N.Y 1974), *aff'd in relevant part*, 540 F.2d 27 (2d Cir. 1976).

28. *See* UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2(b), 12 U.L.A. 63 (1975) ("if equity requires the collective liability of some as a group shall constitute a single share").

29. 399 F. Supp. 1330 (D. Md. 1975), *aff'd per curiam*, 542 F.2d 1235 (4th Cir. 1976). Arguably, the *Wassel* court was not the first to employ the entity theory. Four years earlier in Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544 (E.D.N.Y. 1971), the district court found four defendants liable under section 11 of the 1933 Securities Act: one issuer and three directors. Apparently, the joint and several liability was split between the directors and the issuer. *Id.* at 588. *Wassel* was, however, the first to expressly define what the entity theory was.

30. The defendants were held liable under section 12(1) of the 1933 Securities Act. Under that provision there is no scienter requirement to hold defendants liable. The court, however, addressed 10b-5 liability which has a scienter requirement and found both sellers liable. 399 F. Supp. at 1363. The court also found that the corporate counsel was similarly liable in the seller's suit for contribution. *Id.* at 1366.

31. *See supra* note 2.

32. 399 F. Supp. at 1370.

33. *Id.*

ciples in the pro-rata framework, it, along with other cases, did not deviate from the implied congressional intent for pro-rata apportionment coming out of the "as in cases of contract" language.

B. *The Breakdown of Congressional Intent for Pro-rata Apportionment*

Relative fault apportionment finds its well-springs in the dictum of the district court's opinion in *Gould v. American-Hawaiian Steamship Co.*.[34] *Gould* involved a contribution claim between settling and non-settling defendants under section 14(a) of the Exchange Act.[35] The court was reluctant to read the "as in cases of contract" language of the express private remedy sections of the securities acts to mandate a strict pro-rata share measurement for contribution.[36] Rejecting the non-settling defendants' argument for statutorily required pro-rata apportionment, the court noted:

> The legislative history of the Securities Acts does not interpret this phrase, but it was evidently intended to avoid restrictions on contribution then found in the common law and, in particular, the policy denying contribution among joint tortfeasors. There is no evidence that this provision was designed by Congress to preclude equitable considerations in awarding contribution.[37]

Although *Gould* was not a claim under section 10(b) and rule 10b-5, and the court did not eventually "do" any relative apportioning of damages, the dictum was significant. Before *Gould*, the "as in cases of contract" language was viewed as controlling support for the proposition that apportionment was also "as in cases of contract" or pro-rata. After *Gould*, that support was seriously injured. Hence, with *Gould*, pro-rata apportionment lost its ostensible statutory footings in federal courts and was left to stand on other grounds—grounds which because of

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34. 387 F. Supp. 163 (D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976).

35. 15 U.S.C. § 78n(a) (1982) (liability for false and misleading proxy solicitation issued in connection with a merger). Unlike section 10(b) liability, section 14(a) has no prerequisite of scienter for personal liability. *Id.*

36. 387 F. Supp. at 170 ("This Court is unwilling to read the phrase 'as in cases of contract' as precluding the application of equitable principles of contribution under § 14(a).").

37. *Id.* (footnotes and citations omitted).

the strong reliance on the "as in cases of contract" language were underdeveloped and virtually non-existent in federal opinions.

C. *The Relative Fault Fairness Approach in Federal Courts*

The district court in *McLean v. Alexander*[38] proclaimed itself as the first federal court to employ a relative fault apportionment of liability under a section 10(b) and rule 10b-5 contribution claim.[39] Taking advantage of the new freedom offered by *Gould*'s rejection of statutorily mandated pro-rata apportionment, the *McLean* court found it "unclear why a different result ought to obtain in the area of federal securities or why in the absence of controlling federal precedent, a result different from that provided by state law is mandated."[40] Based on the court's considerations of "equity and common sense,"[41] it apportioned contribution between section 10(b) and rule 10b-5 co-defendants based on prevailing doctrines of relative fault.

Since *McLean*, a handful of district courts have accepted relative fault as the standard for apportioning contribution in section 10(b) and rule 10b-5 defendant cross-claims.[42] With the

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38. 449 F. Supp. 1251 (D. Del. 1978), *aff'd in part, rev'd in part*, 599 F.2d 1190 (3d Cir. 1979). For a discussion of the facts of *McLean* see *infra* note 61.

39. 449 F. Supp. at 1274. The proposed securities code advocates a sharing for contribution based on "relative responsibility of each person for the loss incurred." ALI FED. SEC. CODE § 1724(f)(2) (1980). The comment to this section suggests that relative fault as developed in *McLean* is the basis for relative responsibility and refers the reader to that case for a comprehensive discussion.

40. 449 F. Supp. at 1276.

41. *Id.*

42. *See, e.g.*, Pepsico, Inc. v. Continental Casualty Co., 640 F. Supp. 656, 662 (S.D.N.Y. 1986) (Relying on *McLean*, the court indicated that where an insurance settlement discharged an entire claim the policy holder may seek reimbursement from others not covered by the policy in amounts based on the relative culpability of those parties.).

A substantial number of district courts have confronted the contribution apportionment issue in the context of determining whether a settling defendant paid his "fair share" and thus is insulated from contribution from the in-court loser. Federal courts have held that when one defendant settles out of court for less than their "fair share" of the liability, the right of contribution for the non-settling defendant extends to the settling defendant. *See, e.g.*, Smith v. Mulvaney, 827 F.2d 558, 562 (9th Cir. 1987). Essentially, courts view the right to contribution as uncompromisingly guaranteed by express provisions of the securities acts. *See* Fischer, *Contribution in 10b-5 Actions*, 33 BUS. LAW. 1821, 1831-36 (1978) (discussion of ramifications of contribution beyond settlement and proposals for reform). When pro-rata apportionment was unquestioned, the courts' analysis was little more than simple division. If there were two parties liable under the law then a settling party could only buy his peace with a settlement amount that was equal or greater than one-half of the total liability. But, with changes brought about by cases such as *Gould* and *McLean*, district courts threw out mathematics and applied a

exception of a few district courts,[43] *McLean* has been viewed as controlling precedent in favor of relative fault apportionment. Recently, the Ninth Circuit has become the first and only federal appellate court to follow *McLean*'s relative fault approach with its decision in *Smith v. Mulvaney*.[44]

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different analysis to find whether settling defendants would be protected.

Because of the guaranteed right to contribution (i.e., contribution reaching beyond partial settlements) courts would have to determine whether the amount each defendant paid adequately discharged its "relative culpability" share. The analysis of a few district courts that have addressed the issue in this context has been that a settling party had paid his "fair share" in a settlement if relative culpability was considered in the pre-trial settlement and that settlement was approved by the trial judge. *See, e.g.*, Smith v. Mulvaney, [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,084, at 91,424 (S.D. Cal. June 5, 1985), *rev'd*, 827 F.2d 558 (9th Cir. 1987); *In re* NuCorp Energy Securities Litigation, 661 F. Supp. 1403 (S.D. Cal. 1987); Nelson v. Bennett, 662 F. Supp. 1324 (E.D. Cal. 1987). With this analysis, a settling defendant could possibly buy his way out of a suit for less than his relative culpability share (because other factors are considered in settlement other than culpability and also the total amount of damages would not be known until the suit was finally tried against the non-settling defendant(s)).

43. For an example of a district court not citing *McLean*, but supporting its general proposition, see Sirota v. Solitron Devices Inc., 97 F.R.D. 732 (S.D.N.Y. 1983). This case was on remand from Sirota v. Solitron Devices Inc., 673 F.2d 566 (2d Cir.), *cert. denied*, 459 U.S. 838 (1982), where the Second Circuit stated that the amount of contribution available was for the discretion of the trial judge. 673 F.2d at 578. On remand the district court noted that the unresolved issues of apportionment of contribution involved questions of "relative culpability." 97 F.R.D. at 736.

44. 827 F.2d 558 (9th Cir. 1987). In Sirota v. Solitron Devices Inc., 673 F.2d 566 (2d Cir.), *cert. denied*, 459 U.S. 838 (1982), the Second Circuit arguably addressed the issue of relative culpability for contribution apportionment by remanding the issue of contribution apportionment to the trial court stating that it was an issue for the trial court to decide. However, it did not develop circuit court precedent regarding the way the trial court should decide the issue as *Smith* does. On remand the district court dealt with the issue in short shrift noting that contribution would be based on principles of relative fault. Sirota v. Solitron Devices Inc., 97 F.R.D. 732, 736 (S.D.N.Y. 1983).

Smith involved a claim by Helen Smith for contribution against settling defendants in a section 10(b) and rule 10b-5 action. Mrs. Smith had been found liable for violations of section 10(b) and rule 10b-5 for her involvement in the failure of a bank and sought contribution from the board of directors who settled before trial.

The board settled for a combined total of $722,000. The settlement magistrate divided the $722,000 between the nineteen settling directors in amounts ranging from $3,500 to $140,000. Brief of Appellees at 5, Smith v. Mulvaney, 827 F.2d 558 (9th Cir. 1987) (No. 86-6076). Each directors' relative share supposedly reflected "tenure on the board, apparent culpability as adduced from discovery, and the net assets of the individual defendants." *Id.*

Helen Smith refused plaintiffs' offer to settle for $150,000 according to the magistrate's formula and tested her liability in court. The jury found her liable for secondary violations of Rule 10b-5, fraud, conspiracy to defraud, and conspiracy to abuse control. 693 F.2d at 937 & nn.4-5. The court assessed a judgment of $4.4 million dollars against her for violations of Section 10(b) and rule 10b-5. 827 F.2d at 559.

Mrs. Smith sought contribution from the settling director-defendants in a subsequent district court suit. She lost again. Although the trial judge recognized the right to contribution extending beyond settlement, he held that right barred because the settling

IV. Analysis of Relative Fault as Developed in Federal Courts

McLean and *Smith* form the basis for a broad acceptance of relative fault apportionment in the federal courts. Stated simply, the cases stand for the proposition that relative fault is the desirable and proper basis for measuring liability in a contribution claim under section 10(b) and rule 10b-5.[45] Both cases share the same fundamental analysis: first, that there is no basis for congressional intent of pro-rata apportionment to be derived from the "as in cases of contract" language of the securities laws,[46] and second, that to apply pro-rata apportionment substitutes mathematics for judicial integrity and is simply not fair where some parties are more culpable or more at fault than others.[47]

Commentators who advocate the relative fault standard likewise adhere to the proposition that relative fault principles of fairness and equity should replace static adherence to pro-rata apportionment.[48] However, before jumping on the fairness bandwagon of relative fault apportionment, courts should look closely at the foundation of relative fault and temper their emphasis on fairness with a recognition of the favorable arguments in favor of pro-rata apportionment.

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parties had paid their proportionate share. Smith v. Mulvaney, [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,084, at 91,425 (S.D. Cal. June 5, 1985). The court rejected traditional pro-rata apportionment in favor of relative culpability apportionment. Further, it decided that the previous settlement, because it considered culpability as a factor, adequately reflected the relative shares of liability for each director-defendant, thus discharging their liability.

Unhappy with her results, Mrs. Smith appealed to the Ninth Circuit. The appellate court reversed the holding of the district court, but, relying on *Gould* and *McLean*, affirmed the general principle that contribution should be apportioned according to relative culpability. The appellate court criticized the district court's conclusion that because the settlement proceedings had considered relative culpability, they adequately reflected the settling directors' apportionable shares for purposes of contribution. 827 F.2d at 562. The Ninth Circuit remanded the case for independent judicial determination of relative fault apportionment between each of the settling defendants.

45. *Smith* also stands for the proposition that the relative fault of any party can only be ascertained by independent judicial determination, and independent settlements that consider relative fault cannot be considered as conclusive. *Smith* will surely impact the present inconsistency among courts concerning the effects of a partial settlement in securities litigation. For an excellent discussion of the uncertainty of the effects of partial settlements in this area and a suggested approach, see Adamski, *supra* note 24, at 542-73.

46. *See Smith*, 827 F.2d at 560; McLean v. Alexander, 449 F. Supp. 1251, 1275 n.81 (D. Del. 1978), *aff'd in part, rev'd in part*, 599 F.2d 1190 (3d Cir. 1979).

47. *See Smith*, 827 F.2d at 561; *McLean*, 449 F. Supp. at 1273.

48. *See* Adamski, *supra* note 24, at 557; Fischer, *supra* note 42, at 1827.

A. Congressional "Non-Intent"

Relative fault apportionment of contribution is the caboose in a train of judicially implied rights found in section 10(b). As drafted, section 10(b) contains no express legislative language allowing a private right of action, no language allowing for contribution, and no language indicating a relative fault apportionment method for sharing of contribution. These rights, however, are now well recognized as part of section 10(b) and rule 10b-5 actions.[49]

The Supreme Court has indicated that when federal statutes do not expressly provide for private rights of action, implication of rights should be consistent with the "intent of Congress" with regard to the laws in question.[50] The development of private rights of actions in section 10(b) actions traditionally has focused on the intent of Congress and the relationship between implied rights and the purpose of the statutes from which those rights are derived. For example, federal courts endorsing the implication of contribution rights in section 10(b) and rule 10b-5 actions have buttressed their decisions by noting the increased effectiveness in meeting the primary congressional goal of fraud deterrence by allowing contribution.[51]

In further fashioning the implied rights of contribution in section 10(b) and rule 10b-5 cases, courts should continue to imply rights consistent with the overall purpose and intent of the underlying laws from which the rights are derived. As noted, that congressional purpose is deterrence of fraud and protection of investors in the national securities market.[52] Therefore, evalu-

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49. *But cf. In re* Professional Fin. Management, Ltd., 683 F. Supp. 1283 (D. Minn. 1988) (court declined to recognize an implied right of contribution in section 10(b) and rule 10b-5 actions finding no intent for contribution under those provisions).

50. *See* Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630 (1981). At issue in *Texas Industries* was whether or not there was an implied right of contribution between co-violators of federal antitrust laws. *See also* Note, *Judicial Implication of Contribution Under the Securities Exchange Act: Is the New Branch on the Judicial Oak Threatened by Strict Statutory Construction?*, 16 SUFFOLK U.L. REV. 983, 998-1011 (1982).

51. *See* Huddleston v. Herman & MacLean, 640 F.2d 534, 558 (5th Cir. 1981), *aff'd in part, rev'd in part*, 459 U.S. 375 (1982); Heizer Corp. v. Ross, 601 F.2d 330, 332 (7th Cir. 1979); Marrero v. Abraham, 473 F. Supp. 1271, 1278 (E.D. La. 1979); Odette v. Shearson Hammill & Co., 394 F. Supp. 946, 958 (S.D.N.Y. 1975); Globus, Inc. v. Law Research Serv., Inc., 318 F. Supp. 955, 958 (S.D.N.Y. 1970), *aff'd per curiam*, 442 F.2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971).

52. *See generally supra* note 6 and accompanying text.

ation of the method of apportionment should show consistency with that intent.

Courts employing principles of relative fault have failed to address this issue and focus instead on fairness between the liable co-parties without evaluating the intent or purpose of Congress in enacting the fraud provisions. For example, the opinions in both *Smith* and *McLean* capitalize on the language of *Gould* which shows a non-intent for a method of allocation but fail to discuss why relative fault or pro-rata is more consistent with the legislative intent behind the securities acts and, specifically, section 10(b). The "non-intent" for pro-rata or relative fault apportionment as developed in *Gould* should not pave the way for courts to fashion apportionment the way they see fit, but should only be seen as an opportunity for courts to examine how well either method fits with the overall intent and purpose behind section 10(b).

B. Congressional Purpose

Fairness between liable co-defendants makes a good campaign slogan for advocates of relative fault. But, as noted, perhaps more important than fairness between co-defendants is the overall impact and efficacy of this fairness doctrine on the legislative purpose behind the securities acts to protect the public and deter fraud.[53]

Accepting that deterrence and protection of the public are the congressional purposes behind allowing contribution,[54] the efficacy of pro-rata apportionment should be compared with relative fault apportionment in accomplishing that goal.

Professor Adamski, an advocate of relative fault apportionment, presents the argument that the deterrent impact of the securities laws would not be curtailed, but, perhaps, enhanced by relative fault apportionment.[55] Basically, she argues that the mere fact that contribution is available is sufficient deterrent and how that contribution is apportioned makes little difference.[56] Further, she suggests that relative fault apportionment is more likely to deter major participants who would bear heavier proportions of the losses. She concedes that deterrence of minor

53. *See generally supra* note 6 and accompanying text.
54. *See infra* note 51 and accompanying text.
55. *See* Adamski, *supra* note 24, at 558.
56. *Id.* at 558 n.163.

participants would be greater under the pro-rata standard, but considers the fairness aspects of relative fault along with the desirable deterrent effect on major participants to outweigh that advantage.[57]

The basic premise for rejecting pro-rata apportionment in favor of relative fault apportionment is simple fairness. It is not fair to hold defendants with differing degrees of culpability equally liable. However, fairness alone is not necessarily the best way to promote goals of honesty and deter fraud under section 10(b) and rule 10b-5. As Professor Adamski conceded, discouragement of intentional fraud or deceit has greater effect, at least on minor participants, if "less culpable" actors know that they will reap a pro-rata share of any damages with the "more culpable" parties. For minor participants, a relative fault measure would perhaps grant them some security in becoming involved with a grand-scale tortfeasor. In contrast, the pro-rata method would provide greater discouragement. Furthermore, it is probable that relative fault may, indeed, have the effect of encouraging more minor participants to become involved in frauds against the public, thus substantially compromising the legislative purpose and goal of deterrence.

Additionally, courts which have denied indemnity claims between actual or potential co-defendants in securities fraud cases have

> based their rejection . . . on public policy grounds and on an analysis of the purposes of the federal securities laws. Since the main objective of the federal securities laws is to deter future misconduct, rather than compensate the injured party, . . . courts feared that permitting indemnity might frustrate the congressional policy of deterring securities fraud.[58]

Indemnity shifts the entire loss from one party to another. This has been found unacceptable in securities litigation based on deterrence policies. Relative fault apportionment of contribution may also act to shift a great proportion of loss on another and, likewise, is probably incompatible with federal deterrence policies.[59]

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57. *Id.* at 558.

58. *In re* Olympia Brewing Co. Sec. Litigation, 674 F. Supp. 597, 610 (N.D. Ill. 1987) (court cites to numerous federal securities cases which support the above quoted proposition).

59. In other areas of federal law, courts have determined that a greater deterrent effect is had by disallowing contribution altogether, which supports arguments that pro-

Finally, a pro-rata standard encourages broad impleader by liable parties because there will be fractionally less damages for a liable defendant. Under relative fault apportionment, some parties may escape any embarrassment or liability altogether simply because they were less culpable and, economically, it would not be worth a party's time and money to exact contribution in court. Pro-rata apportionment would better ensure that every liable party had to answer for his fraudulent activities in court. Thus, where relative fault might miss minor participants and have zero deterrent effect on those minor participants, pro-rata would better provide that no fraud, no matter how minor, would escape its federally mandated consequences.

C. Vast Ranges of Culpability

Though congruity with the purposes of section 10(b) should be the controlling concern in evaluating an apportionment standard, it is difficult to ignore the concern which has swayed courts to use a relative fault standard—fairness. With a simple understanding of terms, most people on the street would agree that it is improper to hold wrongdoers with vast ranges of culpability responsible for equal amounts of damages. The *McLean* and *Smith* courts agreed that to do so would substitute mathematical for judicial integrity.[60]

However, both courts assumed, without discussion, that between joint wrongdoers in a section 10(b) and rule 10b-5 action there actually could be a vast range of culpability.[61] In fact, be-

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rata, although not "fair," may be proper as a more effective deterrent. *See* Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc., 604 F.2d 897 (5th Cir. 1979), *aff'd sub nom.*, Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1980) (holding that the deterrent effect by imposing sole liability for treble damages under federal antitrust laws supported denial of contribution).

60. *See* Smith v. Mulvaney, 827 F.2d 558, 561 (9th Cir. 1987); *McLean v. Alexander*, 449 F. Supp. 1251, 1273 (D. Del. 1978), *aff'd in part, rev'd in part*, 599 F.2d 1190 (3d Cir. 1979).

61. The court in *McLean* was actually dealing with violators with differing degrees of culpability—a negligent party and an intentional tortfeasor. The court wrongly determined that a negligent and an intentional wrongdoer could be held jointly liable under section 10(b) and rule 10b-5.

In *McLean*, the plaintiff shareholder sued the issuers and their accounting firm under section 10(b) and rule 10b-5. Before trial, the issuers settled with the plaintiff. At trial, the non-settling accounting firm was found liable under section 10(b) and sought contribution from the settling issuers. The accounting firm claimed that since the issuer was the moving force responsible for plaintiff's losses, it should bear the heavier burden of liability. 449 F. Supp. at 1256-60. "Applying principles of relative fault," *Id.*, the court concluded that rights of contribution and apportionment of liabilities should mirror the

cause of the scienter requirement and the strict standards for finding secondary liability under section 10(b) and rule 10b-5, there are no significant differences in culpability which are possible under these provisions. Thus, the fairness argument lacks merit and should not cloud judicial sentiment in dealing with section 10(b) and rule 10b-5 apportionment issues.

1. The scienter requirement

Even though a relative culpability measure for contribution may be appropriate under some securities provisions, that principle should not govern section 10(b) and rule 10b-5 actions. For example, under section 11 of the 1933 Securities Act, a defendant may be held jointly and severally liable for acts with intent elements ranging from negligence to intentional misrepresentation.[62] Under section 11, pro-rata apportionment between a mere negligent defendant and an intentionally fraudulent defendant does seem to substitute mathematical for judicial integrity.[63] However, with section 10(b) and rule 10b-5 liability premised on scienter,[64] mathematical pro-rata apportionment is appropriate.

10% fault of the accounting firm and the 90% fault of the issuers. On appeal, the 10(b) judgment against the accounting firm was reversed. McLean v. Alexander, 599 F.2d 1190 (3d Cir. 1979). The Third Circuit determined that the accounting firm did not act with the requisite scienter to be held liable for violations of 10(b)—the firm did not contemplate or believe that its actions would result in misleading the buyer or the seller. Instead of being fraudulent, it was merely negligent. 599 F.2d at 1202. The court declined to comment on the issue of contribution under section 10(b) and dismissed it as moot because the accounting firm no longer was liable. *Id.*

Given this reversal, the original trial court's struggle with the inequity of pro-rata apportionment becomes more understandable. It was essentially faced with the responsibility of dumping fifty percent of nearly two million dollars of damages on a defendant that had unintentionally harmed the plaintiff. It is no wonder that the district court shamelessly announced that the pro-rata standard had "more mathematical than judicial integrity." 449 F. Supp. at 1273.

It is uncertain whether the court would have decided differently had the accounting firm actually qualified under the section 10(b) and rule 10b-5 scienter requirement, but the difference between a defendant who acts with intent to defraud and one who acts without that intent would have probably caused the court to look with less forgiving eyes toward the accounting firm. With legitimate section 10(b) liability, perhaps the court would have fashioned a convincing argument that there was some degree of judicial integrity within the mathematical pro-rata apportionment tradition.

62. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 208 (1976).

63. For further discussion of why pro-rata contribution should not apply to section 11 cases, see Note, *Apportioning Contribution Shares Under the Federal Securities Acts: A Suggested Approach for an Unsettled Area*, 50 FORDHAM L. REV. 450, 469-71 (1981).

64. For further discussion of the scienter requirement, see *infra* notes 66-77 and accompanying text.

In order to accept the integrity of relative fault apportionment, which has finally been affirmed by a federal appeals court in *Smith*, one must accept the *Smith* court's language that "securities fraud cases . . . include numerous defendants with vast differences in culpability."[65] In fact, between 1956 and 1976, there was arguably a "vast" range of culpability recognized by federal courts qualifying as the requisite intent for section 10(b) and rule 10b-5 liability.[66] This intent was recognized as encompassing intent from intentional fraud to negligence.[67] However, in the landmark securities case of *Ernst & Ernst v. Hochfelder*,[68] the Supreme Court asserted that liability under section 10(b) and rule 10b-5 required scienter. Further, the Court defined this scienter as a "mental state embracing intent to deceive, manipulate, or defraud."[69] The Court left open the question whether in some circumstances recklessness may be deemed intentional conduct and thus subject to liability under section 10(b) and rule 10b-5.[70]

Given the Supreme Court's decision in *Hochfelder*, the measure of culpability for private actions under section 10(b) and rule 10b-5 should be relatively uniform—a subjective intent to deceive, manipulate, or defraud. In the context of multi-defendant suits for contribution, *Hochfelder* might be read to indicate that when liability is assessed under section 10(b) and rule 10b-5, culpability will have to be fairly level. While there may be differences in degree of involvement, culpability will have to be within the confines of the Court's *Hochfelder* decision in order for liability to attach under section 10(b) and rule 10b-5. In turn, pro-rata apportionment between defendants becomes equitably palatable.

Federal circuit and district courts have taken "assigned" liberty to address the question left open in *Hochfelder*—whether recklessness in some circumstances may qualify for scienter under section 10(b) and rule 10b-5.[71] The majority of federal

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65. Smith v. Mulvaney, 827 F.2d 558, 561 (9th Cir. 1987).

66. For an in depth discussion of the conflicting views of scienter in the federal courts prior to 1976, see Bucklo, Scienter *and Rule 10b-5*, 67 Nw. U.L. Rev. 562 (1972).

67. *See, e.g.*, White v. Abrams, 495 F.2d 724, 730 (9th Cir. 1974).

68. 425 U.S. 185 (1976).

69. *Id.* at 194 n.12.

70. *Id.*

71. One district court judge noted that the *Hochfelder* recklessness footnote "has served as a veritable quagmire for the courts." SEC v. Paro, 468 F. Supp. 635, 647 (N.D.N.Y. 1979).

courts accept recklessness as meeting section 10(b) scienter requirements.[72] Furthermore, federal courts have defined recklessness in terms falling between "barely reckless"[73] and "severe recklessness."[74]

With intent less than intentional fraud entering again into the picture of scienter for section 10(b) and rule 10b-5 actions, it again becomes arguable that multiple defendants may have varying degrees of culpability which need to be recognized in a suit for contribution.[75]

However, commentators addressing the issue of recklessness qualifying as scienter since *Hochfelder* criticize courts that lean toward a negligence standard and indicate that the standard of recklessness that meets the section 10(b) and rule 10b-5 scienter requirement is actually high and should at least conform to the high standard of recklessness needed to prove common-law deceit. This standard entails "showing that defendant acted so recklessly . . . that he must have been aware of his recklessness, and therefore could not have held a genuine belief in the truth of his statement."[76]

Assuming that scienter requirements of section 10(b) and rule 10b-5 actions should conform narrowly to the Supreme Court's decision in *Hochfelder*, any incorporation of recklessness into the scienter prerequisite for liability should require at least knowledgeable misrepresentation. Accordingly, the conclusion drawn by *McLean* and *Smith*, that there are vast degrees of cul-

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72. *See* T. HAZEN, *supra* note 2, § 13.4, at 459.

73. *See, e.g.*, Stern v. American Bankshares Corp., 429 F. Supp. 818 (E.D. Wis. 1977). *But see* Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1977) (The court stated that the 10(b) scienter requirement is "closer to being a lesser form of intent than merely a greater degree of ordinary negligence. We perceive it to be not just a difference in degree, but also in kind.").

74. *See* Warren v. Reserve Fund Inc., 728 F.2d 741, 745 (5th Cir. 1984); *see also* Annotation, *What Constitutes Recklessness Sufficient to Show Necessary Element of Scienter in Civil Action for Damages Under § 10(b) of Securities Exchange Act of 1934 (15 USCS § 78j(b)) and Rule 10b-5 of the Securities and Exchange Commission*, 49 A.L.R. FED. 392 (1980).

75. *But cf.* T. HAZEN, *supra* note 2, § 13.4, at 460 ("[T]he recklessness standard seems to impart a standard analogous to gross negligence and conduct that is sufficiently culpable to justify a fraud type remedy. As such, it seems to defy a more specific definition. Resolution of the availability of a recklessness standard, as well as a more explicit definition, must await Supreme Court determination.").

76. Milich, *Securities Fraud Under Section 10(b) and Rule 10b-5: Scienter, Recklessness, and the Good Faith Defense*, 11 J. CORP. L. 179, 200 (1986); *see also* Comment, *Recklessness and the Rule 10b-5 Scienter Standard after* Hochfelder, 48 FORDHAM L. REV. 817 (1980).

pability in section 10(b) and rule 10b-5 scienter, lacks validity. The range of culpability that can exist in a section 10(b) and rule 10b-5 action is not great but small.[77]

2. *Secondary liability*

Another possible reason advanced for the position that relative culpability apportionment is preferable to the pro-rata method is that in securities fraud "relatively remote and insignificant parties"[78] may be found liable under section 10(b) and rule 10b-5. Although the securities acts do not expressly impose secondary (aiding and abetting or conspiracy) liability for securities fraud, the concept has been broadly accepted by federal courts.[79]

Since secondary violators are technically just "helpers" for the primary wrongdoers it can be argued that they should not be as liable. However, even secondarily liable parties must have the requisite scienter to wear the scarlet letter of a section 10(b) and rule 10b-5 violation. In fact, there is authority that secondary violators must demonstrate a higher degree of culpability to be held liable to the same degree of the primary violator. Professor Hazen explains:

> A question arises as to the state of mind which must be found in order to impose aider and abettor liability. While some courts have found recklessness sufficient proof of scienter to impose aider and abettor liability, it has alternatively been stated that "the scienter requirement scales upward when the activity is more remote." Under this view, the less assistance

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77. "Any theoretical disparity in culpability that exists under section 10(b) between an inside defendant whose liability is predicated on intentional conduct and the outside defendant who acted recklessly will not be of sufficient magnitude to warrant an unequal distribution of the liability through relative fault apportionment." Note, *Apportioning Contribution Shares Under the Federal Securities Acts: A Suggested Approach for an Unsettled Area*, 50 FORDHAM L. REV. 450, 468-69 (1981).

78. 3 A. BROMBERG & L. LOWENFELS, SECURITIES FRAUD & COMMODITIES FRAUD § 8.5(585), at 208.52 (1984).

79. "Although the Supreme Court has expressly reserved the question of whether a person can be held liable for aiding and abetting, every circuit court which has faced the issue has recognized aiding and abetting as proper basis for liability." T. HAZEN, *supra* note 2 § 7.8, at 208-09; *see* Fischel, *Secondary Liability Under Section 10(b) of the Securities Action of 1934*, 69 CALIF. L. REV. 80 (1981) (Professor Fischel acknowledges that courts have incorporated common law doctrines of secondary and aiding and abetting liability into the securities law. His commentary follows the progression that has developed in the district and circuit courts (with no Supreme Court guidance) and finally concludes that secondary liability under the securities fraud provisions is improper.)

> given by the aider and abettor or the more closely the assistance given resembles a transaction performed in the ordinary course of business, the heavier becomes the plaintiff's burden of showing willful and intentional action on the part of the alleged aider and abettor.[80]

Since it can be argued that secondary parties must be more culpable than primary parties because of their remoteness, secondary liability in section 10(b) and rule 10b-5 claims should be on the highly culpable side of the scienter requirement. The heightened culpability standard for secondary liability coupled with the narrow range of that culpability as advocated in *Hochfelder* show pro-rata apportionment may be fair even as to remote and insignificant parties.

Additionally, a defendant may not be held responsible as a secondary violator unless the defendant has "actual knowledge . . . of the wrong and of his or her role in furthering it" and has given "substantial assistance in the wrong."[81] Similarly, "there must be a substantial causal connection between the culpable conduct of the alleged aider and abettor and the harm to the plaintiff."[82] Hence, not only must the secondary violator act with a higher degree of intent, but must also have evidenced substantial participation in the perpetration of the primary violation.

These considerations suggest that for a party to be held liable as a secondary party perhaps his intent and involvement are not remote and insignificant but substantial. This intent and involvement may be substantial enough that even fairness concepts point more toward the desirability of pro-rata apportionment over relative fault.

V. CONCLUSION

Within the past two decades some courts apportioning contribution in securities fraud cases have departed from the traditional pro-rata apportionment in favor of a relative fault fairness approach. This approach circumvents congressional policy of de-

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80. T. HAZEN, *supra* note 2 § 7.8, at 209 (quoting language from Woodward v. Metro Bank of Dallas, 522 F.2d 84, 97 (7th Cir. 1974)) (other footnotes omitted).

81. Harmsen v. Smith, 693 F.2d 932, 943 (9th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983).

82. Mendelsohn v. Capital Underwriters, Inc., 490 F. Supp. 1069, 1084 (N.D. Cal. 1979); *see also* Fund of Funds, Ltd. v. Arthur Anderson & Co., 545 F. Supp. 1314 (S.D.N.Y. 1982) ("but for" causal connection insufficient to prove substantial assistance necessary to support aiding and abetting liability).

terrence, ignores the narrowness of the scienter requirement as defined in *Hochfelder* and in fraud and deceit charges generally, and does not recognize the substantiality requirements of secondary liability. Relative fault policies of fairness have no place between intentional tortfeasors liable under section 10(b) and rule 10b-5. Before jumping on the bandwagon of relative fault apportionment, federal courts should reassess district court and the federal appeals court precedent and consider adherence to traditional pro-rata apportionment in section 10(b) and rule 10b-5 contribution claims.

Adam S. Affleck